Supreme Court, U.S.
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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner Intel Corporation respectfully submits this supplemental brief in response to the brief filed by the Solicitor General on October 6, 2003. *See* Sup. Ct. Rule 15.8.

DISCUSSION

1. The Solicitor General's brief appropriately puts to rest any doubt that certiorari should be granted in this case. Sovereigns on both sides of the Atlantic have now urged the Court to review the recurring issues presented here, and few cases will ever present a better vehicle for resolving those issues. *See* Intel Reply Br. 9-10.[1] Also, as discussed in our petition and reply brief, this case presents not one, but two, circuit conflicts on issues of recurring international significance. Although we disagree (*see* Intel Reply Br. 6-7) with the government's hesitation to find a square circuit conflict on the second question presented in the petition, we quite agree that, no matter how firm the Court perceives that conflict to be, the Court should grant certiorari on all questions presented "to clarify the proper application of the statute." U.S. Br. 1.

2. a. There is more agreement than disagreement between Intel and the federal government on the merits. Like Intel, the government agrees that granting AMD the discovery it seeks would be anomalous at best, given that (i) AMD is not a litigant in any foreign "proceeding," (ii) AMD has no right to such discovery under the laws of the sovereign it ostensibly hopes to benefit (the European Commission), and (iii) that sovereign has made clear that it does not want such discovery in any event. *See* U.S. Br. 18-20 & n.7. And the government comes very close to outright support for Intel's position that discovery under these circumstances

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[1] The European Commission's investigation remains in the same preliminary phase in which it was previously, and the EC has taken none of the procedural steps that must precede the closing of such an investigation. Similarly, the remand proceedings in the district court (*see* Pet. 7 n.3) have been held in abeyance pending this Court's disposition of the petition.

should be denied. *See* U.S. Br. 18 (the relevant factors in this case "weigh against granting the requested discovery").

The principal disagreement between Intel and the government concerns how the federal courts should reach that conclusion. The two circuit conflicts discussed in our petition involve recurring fact patterns, and thus recurring legal questions, in the application of section 1782. The government would commit the resolution of such questions to the ultimate discretion of scores of district courts, each of which would be free to disagree with the others on the proper scope of discovery under section 1782. In contrast, Intel's position, like that of the First, Second, and Eleventh Circuits, would ensure greater predictability and national consistency in this internationally sensitive area by prescribing generally applicable rules of practice to resolve such cases.

The latter course is both preferable and appropriate as a matter of sound legal practice. Appellate courts, including this Court, often exercise their inherent supervisory authority to adopt rules of practice for the lower federal courts to follow in deciding procedural issues, such as the discovery issues presented here:

> It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."

Thomas v. *Arn*, 474 U.S. 140, 146-47 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). In the habeas corpus context, for example, this Court has rejected lower court procedural decisions that "did not contravene the letter" of the governing federal statute, reasoning that the Court can and should impose procedural rules for "channeling the discretion of federal habeas courts" "[i]n light of the profound societal costs that attend the exercise of ha-

beas jurisdiction."[2] Here, the Court should exercise similar authority to make clear that the Ninth Circuit's accommodation of "liberal discovery" in this area (Pet. App. 8a) defeats the very comity objectives underlying section 1782—as the EC observes in its nearly unprecedented amicus brief.

b. Quite apart from these considerations, the text and legislative history of section 1782 fully support the limiting constructions adopted by the First, Second, and Eleventh Circuits. We have discussed those issues in our petition and reply brief and will not repeat that discussion here. Nonetheless, the government makes several points that warrant a brief response.

First, the government argues that Congress's use of the phrase "any interested person" rather than "litigant" in the body of section 1782, together with the legislative history of that word choice, suggests that the class of *private persons* entitled to discovery under section 1782 must extend beyond genuine litigants. As noted, the government would then rely on the discretion of individual district courts to deny such discovery to virtually all private non-litigants. But it would be more appropriate and straightforward to read the statute to exclude private non-litigants in the first place. As the Conference Report accompanying the 1964 revisions confirms, Congress used the phrase "any interested person" simply because the category of persons entitled to invoke the statute extends beyond litigants to encompass various types of *officials* who might act on behalf of a foreign sover-

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[2] *Calderon* v. *Thompson*, 523 U.S. 538, 554, 559 (1998) (internal quotation marks and citations omitted); *see also McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (similar approach in adopting "cause and prejudice" standard); *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam) (adopting non-textually-based rule of practice for Fed. R. Civ. P. 58); *Jencks* v. *United States*, 353 U.S. 657 (1957) (adopting non-constitutional, non-statutory rule of practice for criminal discovery in federal cases); *see generally Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

eign: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789; *see also In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1154-55 (11th Cir. 1988).

Nothing in the Report evinces any intent to make discovery under section 1782 available to persons other than litigants, foreign sovereigns, and the designated agents of those sovereigns. Indeed, the Report consistently describes the class of potential section 1782 applicants as foreign tribunals (or officials) and private "litigants before such tribunals." 1964 U.S.C.C.A.N. at 3788.[3] And, of course, the very title of section 1782 makes clear that the statute was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (emphasis added); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'the title of a statute . . . [is

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[3] *Accord* 1964 U.S.C.C.A.N. at 3782-83 (section 1782 designed to "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3788 (section 1782 "clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and *litigants*"); *id.* at 3789 (application may be filed "by an interested person, such as a person designated by or under a foreign law, or a *party* to the foreign or international *litigation*"); *id.* ("proposed revised subsection (a) permits effective and desirable assistance to foreign and international courts and *litigants* before such courts"); *id.* at 3792 (transmittal letter from the Commission on International Rules of Judicial Procedure) (proposed bill is designed "to improve judicial procedures for serving documents, obtaining evidence, and proving documents in *litigation* with international aspects"); *id.* at 3793 (enactment would "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3794 (letter from President Kennedy to Congress) ("we have reached the conclusion that the procedural reforms which [the legislation's] enactment would accomplish would be most desirable from the standpoint of the administration of international justice on behalf of private *litigants*") (all emphases added).

a] tool[] available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947))).

Viewed in this light, the 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—cuts squarely for, rather than against, an appropriately limited scope for private party discovery under section 1782.[4] This amendment reveals Congress's intent to preserve pre-litigation discovery in the one context in which it is customary, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents.[5] By explicitly confining that clause to the criminal setting, Congress indicated that it did not wish to extend pre-litigation discovery to the civil context. That is understandable, because, outside of the narrow circumstances described in Fed. R. Civ. P. 27(a), prelitigation civil discovery is almost unheard of, both in the United States and in foreign jurisdictions.

Like AMD, the government also attributes significance to Congress's deletion in 1964 of the word "pending" from the identification of the foreign "proceedings" for which discovery could be taken. But, if this deletion has significance at all, it shows at most that Congress did not mean to condition discovery on the pendency of a proceeding in *all* con-

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[4] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996).

[5] *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310-11 (5th Cir. 1995) (whereas "courts in the United States have routinely undertaken a discoverability determination when the request for information comes from a private litigant" so as "to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules," that comity rationale "is, by necessity, not present in the case where a foreign court is making a request for information, because the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules"); *accord In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 592 (4th Cir. 1996).

texts. As the 1996 amendment later demonstrated, Congress did want to preserve pre-litigation discovery in the criminal context, where it is commonplace. Again, however, it does not follow that Congress wished to create a new species of otherwise ubiquitously unavailable pre-litigation *civil* discovery. In any event, it is doubtful that the deletion of this one word, amid a much broader rephrasing of section 1782 in 1964,[6] carries any real significance at all. As the Second Circuit has observed:

> [T]he legislative history makes no mention of this change and describes the broadening of proceedings in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent: "The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are *pending* before investigating magistrates in foreign countries."

In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702, 705 (2d Cir. 1991) (quoting H.R. Rep. No. 88-1052, at 9 (1963)) (emphasis added by court). Although the Second Circuit ultimately concluded that an "imminence" requirement would better suit the underlying statutory purposes than a requirement that proceedings be "pending," it did so not because it thought the legislative history compelled that result,

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[6] The pre-1964 version of the statute read:

> The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Act of June 25, 1948, 62 Stat. 869, 949 (paragraph break omitted).

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but because it believed such an approach "does no violence to any articulated congressional objective." *Id.* at 706.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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